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Supreme Court of the United States.

OCTOBER TERM, 1902.

Office Supreme Court U. S.
FILED
MAR 23 1903
JAMES H. McKENNEY,
Clerk.

No. 336.

MEXICAN CENTRAL RAILWAY COMPANY, LIMITED, PLAINTIFF IN ERROR,

vs.

J. M. DUTHIE, DEFENDANT IN ERROR.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

I.

The plaintiff's petition failed to aver necessary diverse citizenship. On such pleading the circuit court was without jurisdiction. *If* the averments had been sufficient in that regard, they could have been traversed only by plea in abatement. Such plea was not proper in the absence thereof. The defendant's answer to the petition as filed was that "it denies all and singular the allegations of plaintiff's "said petition, and of this it puts itself upon the country" (Rec., 51).

The issue thus made and tried did not cover the *fact* of plaintiff's citizenship, and the verdict necessarily did *not* cover that essential and primary fact.

The judgment could not be broader than the verdict. After rendition of judgment, it is submitted, no motion could cure the defect. The fact of diverse citizenship, then for the first time sought to be alleged by plaintiff, was one upon which the defendant was entitled to respond by proper plea, and upon issue joined thereon the ascertainment of the truth of the fact thus pleaded was matter for the jury alone. The jury having been dismissed, there was hence no way by which that fact could be determined except by setting aside the verdict and by a new trial and verdict upon properly amended pleadings. Diverse citizenship as a *fact* was not more within the competency of the court to determine in an action at law than any other issuable fact pertaining to the controversy between the parties. It is respectfully submitted that the guaranty of trial by jury under the Federal Constitution in all actions at law involving more than twenty dollars in value applies to each and every fact which is essential to the determination of the controversy, jurisdictional or otherwise. Alienage, minority, or other disability which would bar the right to sue or to recovery are all in the same category. The brief for defendant in error fails to grasp this primary and controlling principle, but the Federal cases cited upon our main brief enforce it with uniform accuracy and precision.

II.

Opposing counsel admits that the practice act of Texas clearly forbids the amendment here sought to be sustained after verdict and judgment. The Federal cases cited to show that the State practice act does not here control are, we submit, without application.

The question presented cannot, we respectfully submit, be determined upon any notions of abstract justice. Orderly procedure, the constitutional guaranty of jury trial upon all issuable facts, due observance of essential matters of substantial importance in the conduct of litigation, and maintenance of settled principles of judicature are too important to be thus set aside.

Respectfully submitted.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel for Plaintiff in Error.

EBEN RICHARDS,
General Counsel.